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## Abortion Rights (Symposium: The Supreme Court and Local Government Law; the 1989-90 Term)

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## ABORTION RIGHTS

*Judge Leon Lazer:*

Our next speaker will address the controversial issue of abortion and the abortion cases that went before the Supreme Court this past Term.

Professor Eileen Kaufman of Touro is a graduate of New York University Law School, has an extensive background in legal services, and was the Westchester Legal Services Managing Attorney. She took part in a large number of significant statewide and nationwide cases dealing with civil rights and gender rights. She has written, as I see the list, a substantial number of articles generally in the civil rights area.<sup>1</sup> She is the Chairperson of the Committee on Public Interest Law of the New York State Bar Association, and has achieved major success in creation of new legislation by the state legislature.<sup>2</sup> She is the Chairperson of the Practicing Law Institute Conference on Social Security Disability Law, which is one of the areas in which she is an expert. She is also a reporter for the New York State Pattern Jury Instructions, and ideally qualified to discuss the area.

*Professor Eileen Kaufman:*

The Supreme Court decided two abortion cases last Term, upholding statutes providing for parental notification coupled with a judicial bypass procedure. In *Ohio v. Akron Center for Reproductive Health*,<sup>3</sup> the Court, by a somewhat predictable vote of six to three, upheld a statute that required notification

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1. See Kaufman, *Punitive Damages in Section 1983 Cases*, in PRACTICING LAW INSTITUTE, SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEYS' FEES 375 (1990) (Course Handbook Series No. 402); Kaufman & Schwartz, *Civil Rights in Transition: Section 1981 and 1983 Cover Discrimination on the Basis of Ancestry and Ethnicity*, 4 TOURO L. REV. 183 (1988); Kaufman, *A Race by any Other Name: The Interplay Between Ethnicity, National Origin and Race for Purposes of Section 1981*, 28 ARIZ. L. REV. 259 (1986).

2. See Equal Access to Justice Act, ch. 770, 1989 N.Y. Laws 1559 (McKinney).

3. 110 S. Ct. 2972 (1990).

to one parent and which contained a judicial bypass procedure.<sup>4</sup> In *Hodgson v. Minnesota*,<sup>5</sup> by a different five to four majority, the Court struck down that portion of a statute which required notification to both parents, but upheld the same provision when coupled with a bypass procedure.<sup>6</sup> Significantly, the Court did not decide whether statutes requiring notification to *one* parent are constitutional in the absence of a judicial bypass provision.

It is important to review each of the opinions generated by these two cases in order to assess their likely significance on the underlying right to an abortion and on the Court's evolving and volatile abortion jurisprudence.

In the previous Term, the Court decided *Webster v. Reproductive Health Services*,<sup>7</sup> where without explicitly overruling *Roe v. Wade*,<sup>8</sup> the plurality seemed to invite the states to impose wide ranging abortion restrictions which would be tested by a decidedly less exacting standard than the strict scrutiny test employed in *Roe*,<sup>9</sup> a standard that is extremely deferential to the state, especially when its asserted interest is the protection of potential life.

*Hodgson v. Minnesota*<sup>10</sup> involved a challenge to a statute<sup>11</sup> described by Justice O'Connor as the "most stringent notification statute in the country."<sup>12</sup> The statute required notification to both parents of an unemancipated minor at least forty-eight hours before an abortion could be performed. The statute's notification requirement applied to all living parents, regardless of whether they were the custodial or non-custodial parent, re-

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4. *Id.* at 2983-84. The Court noted that it "believed that a State may require the physician himself or herself to take reasonable steps to notify a minor's parents because the parent often will provide important medical data to the physician." *Id.* at 2983.

5. 110 S. Ct. 2926 (1990).

6. *Id.* at 2948-49.

7. 109 S. Ct. 3040 (1989).

8. 410 U.S. 113 (1973).

9. *Id.* at 152-56.

10. 110 S. Ct. 2926 (1990).

11. MINN. STAT. ANN. § 144.343(2) (West 1989).

12. *Hodgson*, 110 S. Ct. at 2950 (O'Connor, J., concurring in part and concurring in the judgment in part).

ardless of whether the parents were divorced or separated, and regardless of whether the parent had ever even lived with the pregnant minor or her mother.<sup>13</sup> A doctor performing an abortion without adhering to the statute's notification requirements could be subjected to "criminal sanctions and to civil liability in an action brought by any person 'wrongfully denied notification.'"<sup>14</sup>

Another section of the Minnesota statute provided for a judicial bypass procedure if the two-parent notification requirement was temporarily or permanently enjoined by court order.<sup>15</sup> The procedure allows the minor to seek a court order authorizing the abortion upon a showing that she is sufficiently mature to make the decision herself, or that, even though she lacks the requisite maturity, the abortion without notice to both parents would be in her best interest.<sup>16</sup>

Five justices found the two-parent notification requirement unaccompanied by a judicial bypass procedure to be unconstitutional.<sup>17</sup> Most notable on this list, of course, is Justice O'Connor, voting for the very first time to strike down a state restriction on abortion.<sup>18</sup> But while five justices agreed with this result, there were three quite different rationales provided by Justices Stevens, O'Connor, and Marshall.<sup>19</sup>

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13. *Id.* at 2931; MINN. STAT. ANN. § 144.343 (2), (3) (West 1989).

14. *Hodgson*, 110 S. Ct. at 2932; MINN. STAT. ANN. § 144.343(5) (West 1989).

15. MINN. STAT. ANN. § 144.343(6) (West 1989).

16. MINN. STAT. ANN. § 144.343(6)(c)(i) (West 1989).

17. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2947 (1990) (The justices are Stevens, O'Connor, Blackmun, Brennan, and Marshall).

18. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989) (O'Connor, J., concurring in part and concurring in the judgment); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 815 (1986) (O'Connor, J., dissenting); *Diamond v. Charles*, 476 U.S. 54, 71 (1986) (O'Connor, J., concurring in part and concurring in the judgment); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting); *Planned Parenthood of Kansas City v. Ashcroft*, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in the judgment in part and dissenting in part); *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983) (O'Connor, J., concurring in part and concurring in the judgment).

19. For those perspectives, see *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2945-47 (1990) (Stevens, J., delivering the opinion of the Court); *id.* at 2949-50 (O'Connor, J., concurring in part and concurring in the judgment in part); *id.* at 2951 (Mar-

Justice Stevens found the two-parent notification statute unconstitutional because it did not reasonably further any legitimate state interest.<sup>20</sup> He relied on the record, which amply demonstrated that the two-parent notification requirement produced harmful effects on both the minor and the custodial parent in non-intact households, which in Minnesota accounted for fifty percent of all minors.<sup>21</sup> It was equally clear to Justice Stevens that the two parent notification requirement also produced harmful effects to *intact* dysfunctional households where family violence was a problem.<sup>22</sup> With respect to non-dysfunctional families, Justice Stevens concluded that the two parent notification requirement was simply unnecessary because almost by definition, in well functioning families, notice to one parent would result in notice to both.<sup>23</sup> Justice Stevens did indicate, however, that he would uphold a statute requiring notification to one parent, based on the state's legitimate interest in "ensuring that the minor's decision is knowing and intelligent."<sup>24</sup>

Justice O'Connor, writing separately, repeated her unduly burdensome test,<sup>25</sup> first expressed in her dissent in *Akron*.<sup>26</sup> According to Justice O'Connor, a woman's right to decide whether to bear a child is a liberty interest protected by the due process clause of the fourteenth amendment, triggering strict scrutiny only when the regulation imposes an undue burden,<sup>27</sup> which she defines as an absolute obstacle or a severe limitation on the abortion decision.<sup>28</sup> If the particular regulation does not unduly burden the fundamental right, then the Court's evaluation of the regulation should be limited to deter-

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shall, J., concurring in part, concurring in the judgment in part and dissenting in part).

20. *Id.* at 2945.

21. *Id.* at 2938.

22. *Id.* at 2945 n.36.

23. *Id.* at 2945.

24. *Id.* at 2944.

25. *Id.* at 2949-50.

26. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting).

27. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2949-50 (1990).

28. *Akron*, 462 U.S. at 464.

mining whether the regulation is rationally related to a legitimate state purpose.<sup>29</sup>

Applying that standard to the Minnesota statute, Justice O'Connor concluded, not that the statute imposed an undue burden, but rather that, given its broad sweep and its lack of exception, the two-parent notification requirement failed to serve the purposes asserted by the state in too many cases, and was thus unreasonable.<sup>30</sup>

Justice Marshall, in an opinion joined by Justices Brennan and Blackmun, agreed that the "two parent notification requirement [was] not even rationally related to a legitimate state interest," and, therefore, could not satisfy strict scrutiny, which, according to these three Justices, remains the appropriate standard to be used in analyzing restrictions on a woman's fundamental right to have an abortion.<sup>31</sup>

Justices Kennedy, White, Scalia, and Rehnquist dissented from this portion of the decision, finding that the two-parent notification provision without a judicial bypass provision furthers two legitimate state interests: "the state's interest in the welfare of pregnant minors;" and, the state's interest in promoting the role of parents in the "care and upbringing of their children."<sup>32</sup> Without referring to the evidence in the record,<sup>33</sup> Justice Kennedy stated that it was reasonable for the legislature to assume that notice to both parents in most cases benefits minors.<sup>34</sup> The most notable aspect of Justice Kennedy's opinion is the extreme deference that he shows to the legislature. He stated:

[W]e must keep in mind that when we are concerned with extremely sensitive issues, such as the one involved here, the appropriate forum for their resolution in a democracy is the legislature. We should not

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29. *Id.* at 462. Justice O'Connor added that the "unduly burdensome" standard should be applied throughout the entire pregnancy without reference to the particular stage of pregnancy involved. *Id.* at 453.

30. *Hodgson*, 110 S. Ct. at 2950.

31. *Id.* at 2951.

32. *Id.* at 2962.

33. *Id.* at 2967.

34. *Id.*

forget that "legislatures are ultimate guardians of liberties and welfare of the people in quite as great a degree as the courts."<sup>35</sup>

This approach, of course, is reminiscent of and consistent with the approach articulated by the same plurality in *Webster*,<sup>36</sup> whereby a state restriction on abortion is constitutional so long as it permissibly furthers a legitimate state interest.<sup>37</sup>

Justice Scalia wrote separately to repeat his view that there is no constitutionally protected right to an abortion.<sup>38</sup> Justice Scalia denounced the Court's random, unauthorized, and unpredictable effort to devise an abortion code, arguing that "the tools for this job are not to be found in the lawyer's—and hence not in the judge's—workbox."<sup>39</sup>

The other provision of the Minnesota statute that was challenged in *Hodgson*, the two-parent notification requirement coupled with a judicial bypass, was upheld by a different five to four majority in an opinion written by Justice Kennedy and joined in by Justices Rehnquist, Scalia, and White, and concurred in part by Justice O'Connor.<sup>40</sup> This majority, with Justice Stevens agreeing, also upheld the forty-eight hour waiting period after parental notification.<sup>41</sup> Justice O'Connor's short opinion provides little insight as to her reasoning except for her statement that the interference with the internal operation of the family does not exist where the minor can avoid notifying one or both parents by use of the bypass procedure.<sup>42</sup>

The second case, *Ohio v. Akron Center for Reproductive Health*,<sup>43</sup> involved a challenge to a statute that prohibited physicians from performing abortions on unemancipated minors unless the doctor provides twenty-four hour advance notice to one of the minor's parents.<sup>44</sup> The statute provides for a judicial

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35. *Id.* at 2966-67 (quoting *Missouri K. & T.R. v. May*, 194 U.S. 267, 270 (1904)).

36. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

37. *Id.* at 3057.

38. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2961 (1990).

39. *Id.*

40. *Id.*

41. *Id.*; see also MINN. STAT. ANN. § 144.343(2) (West 1990).

42. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2951 (1990).

43. 110 S. Ct. 2972 (1990).

44. *Id.* at 2977; see also OHIO REV. CODE ANN. § 2151.85(A) (Baldwin 1990).

bypass procedure that enables the minor to avoid parental notice if she demonstrates that she has sufficient maturity to make the decision or that notice to her parents is not in her best interests or that "one of her parents has engaged in a pattern of physical, sexual, or emotional abuse against her."<sup>45</sup>

The judicial bypass procedure was challenged on a number of grounds, including the fact that it failed to protect the minor's anonymity;<sup>46</sup> that it could cause delays of up to twenty-two days;<sup>47</sup> that it required the minor to prove her maturity or best interests by clear and convincing evidence;<sup>48</sup> and that its pleading requirements were "a trap for the unwary."<sup>49</sup> Under the statute, the minor was required to choose among three forms; one asserting maturity as the only ground; one asserting only that the abortion was in her best interests; and one which covered both grounds.<sup>50</sup> According to the statute, the state court may not rely on any ground not asserted in the pleading.<sup>51</sup> Thus, if a minor chose the wrong form, the state court could only consider the ground asserted in the form selected.

Without deciding the issue of whether or not bypass provisions are necessary in all parental notice statutes, the Court, in an opinion authored by Justice Kennedy, joined in by Justices Rehnquist, White, Stevens, O'Connor, and Scalia, upheld the constitutionality of the statute, finding that it was consistent with the Court's previous decisions regarding minors and abortion.<sup>52</sup> Justice Kennedy reviewed each of the provisions of the judicial bypass procedure and concluded that the procedure

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45. *Hodgson*, 110 S. Ct. at 2977; *see also* OHIO REV. CODE ANN. §§ 2151.85(A)(4)(a)(b) (Anderson 1990).

46. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2979-80 (1990).

47. *Id.* at 2980.

48. *Id.* at 2981.

49. *Id.* at 2982.

50. *Id.* *See* OHIO REV. CODE ANN. §§ 2151.85(A)(4)(a)(b) & (B)(3) (Baldwin 1990).

51. OHIO REV. CODE ANN. § 2151.85(C)(1) (Baldwin 1990).

52. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2976-77 (1990).



satisfied the *Bellotti v. Baird*<sup>53</sup> four-part test for measuring the bypass procedures.<sup>54</sup>

Once again, Justice Scalia wrote separately reiterating his position that there is no constitutional right to an abortion.<sup>55</sup>

Justice Stevens wrote separately to stress the fact that this was a facial challenge and that until such time that the statute was implemented and a record developed to demonstrate in what way the bypass is inadequate, he was unwilling to conclude that the bypass procedure, on its face, was inadequate.<sup>56</sup> Justice Stevens did indicate, in a footnote, that it would be very "difficult to contend that each of the challenged provisions of the Ohio statute—or the entire mosaic—represents wise legislation."<sup>57</sup>

Justice Blackmun's dissent, joined by Justices Brennan and Marshall, described the judicial bypass procedure as a "tortuous maze."<sup>58</sup> Justice Blackmun acknowledged that the State has "broader authority to regulate the activities of children than of adults, [but that] in doing so, the State nevertheless must demonstrate that there is a significant state interest in conditioning an abortion [to a minor] that is not present in the case of an adult."<sup>59</sup> In this case, according to Justice Blackmun, the state failed to show any significant state interest.<sup>60</sup> Citing *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>61</sup> Justice Blackmun concluded that "[t]he challenged provisions of the Ohio statute are merely 'poorly dis-

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53. 443 U.S. 622 (1979).

54. In *Bellotti*, the Court held that in order for a law requiring parental consent to be valid, it must provide an alternative authorization procedure allowing the minor to show she was mature enough to make the decision, in consultation with her physician, independent of her parent's wishes, or that the desired abortion was in her best interest. In addition, the alternative procedure must assure anonymity and sufficient expedition so that the parental consent requirement did not amount, in fact, to an absolute veto. *Id.* at 643-44.

55. *Ohio*, 110 S. Ct. at 2984.

56. *Id.* at 2993.

57. *Id.* at 2994 n.1.

58. *Id.* at 2985.

59. *Id.* at 2984.

60. *Id.* at 2985.

61. 476 U.S. 747 (1986).

guised elements of discouragement for the abortion decision.'"<sup>62</sup>

These decisions reveal a variety of tensions and conflicts within the Court—some quite obvious, as in the diametrically opposed positions of, for example, Justices Scalia and Blackmun on the threshold questions of whether or not there is any constitutional right to abortion.<sup>63</sup> Another not quite so obvious conflict relates to the justices' concept of society and how families function within that society, with some members of the Court reflecting and acting out of what Professor Tribe has characterized as "nostalgia for the nuclear family."<sup>64</sup> Justice Kennedy displayed this "nostalgia" at the end of his opinion in the *Akron* case, where he tacked on a paragraph in which he talked about the state's entitlement to assume that, for most of its people, the beginnings of understanding of "the profound philosophic choices confronted by a woman who is considering whether to seek an abortion [will be] within the family, society's most intimate association."<sup>65</sup> He goes on to state:

It is both rational and fair for the state to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature. . . . It would deny all dignity to the family to say that the state cannot take this reasonable step in regulating its health professionals to ensure that, in most cases,

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62. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2985 (1990).

63. In *Ohio v. Akron Center for Reproductive Health*, both Justices Scalia and Blackmun expressed their polar views with regard to the constitutionality of the right to an abortion. Justice Scalia vehemently argued that there is no constitutional right to an abortion. *See id.* at 2984. He maintained that such a right cannot be "found in the longstanding traditions of our society, nor can it be logically deduced from the text of the Constitution." *Id.* To punctuate his intense opposition to creating this right Justice Scalia ends his concurrence in *Akron* by stating "[t]he Court should end its disruptive intrusion into this field as soon as possible." *Id.*

Whereas, Justice Blackmun not only asserts that the abortion decision is a constitutionally protected right, but he adds that "the unique nature of the abortion decision, especially when made by a minor, require[s] a State to act with particular sensitivity when it legislates to foster parental involvement in this matter." *Id.* (quoting *Bellotti v. Baird*, 443 U.S. 622, 642 (1979)).

64. 58 USLW 2189, 2202 (synopsis of U.S. Law Week's Constitutional Law Conference held Sept. 8-9, 1989 in Washington, D.C.).

65. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2983-84 (1990).

a young woman will receive guidance and understanding from a parent.<sup>66</sup>

In sharp contrast, Justice Blackmun repeatedly reminded the Court that "there is 'another world out there'. . . that the Court 'either chooses to ignore or refuses to recognize.'"<sup>67</sup> He stated that "[i]t is the unfortunate denizens of that world, often frightened and forlorn, lacking the comfort of loving parental guidance and mature advice, who most need the constitutional protection that the . . . legislature set out to make as difficult as possible to obtain."<sup>68</sup>

Justice Stevens, it seems, has also expressed a concern that some members of the Court reflect and promote a homogenized view of family life. In *Hodgson*,<sup>69</sup> he stated that "[a] state interest in standardizing its children and adults, making the 'private realm of family life' conform to some state-designated ideal, is not a legitimate state interest at all."<sup>70</sup>

What is the likely impact of these two cases and what can be said about the continued vitality of *Roe*<sup>71</sup> and its progeny?<sup>72</sup> Unquestionably, these two cases will have, and indeed already have had, an impact on state parental involvement laws. Approximately thirty-two states have parental involvement laws,<sup>73</sup> although not all states have been enforcing these laws.<sup>74</sup> The two rulings are likely to lead to increased enforcement and to the enactment of new laws similar to those in Minnesota and Ohio. For example, South Carolina and Michigan recently enacted laws requiring consent of one parent or a court before an

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66. *Id.* at 2984.

67. *Id.* at 2993 (quoting *Beal v. Doe*, 432 U.S. 438, 463 (1977)).

68. *Id.*

69. *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990).

70. *Id.* at 2946.

71. *Roe v. Wade*, 410 U.S. 113 (1973).

72. See *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Planned Parenthood Ass'n of Kansas v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976).

73. American Civil Liberties Union: Reproductive Freedom Project, *Reproductive Rights Update*, June 27, 1990, at 2.

74. *Id.*

abortion can be performed on a minor.<sup>75</sup> In addition, parental involvement statutes in Mississippi,<sup>76</sup> Kentucky,<sup>77</sup> and Illinois<sup>78</sup> have been reactivated as a result of the new Court rulings.

With respect to the state of the law, *Roe v. Wade*<sup>79</sup> is still, theoretically, good law, but only because no recent case has required the Court to confront an outright ban on abortions. The first case to do so may come from Guam, where the district court, in a case entitled *Guam Society of Obstetricians and Gynecologists v. Ada*,<sup>80</sup> has enjoined enforcement of a statute that prohibits all abortions except in cases of ectopic pregnancies, where the woman's life is endangered, or where her health would be gravely endangered.<sup>81</sup> According to the New York Times, Governor Ada has decided to appeal the decision to the Ninth Circuit Court of Appeals.<sup>82</sup> Assuming that he does, the Supreme Court will likely hear the case next year.

The other case working its way to the Court is *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>83</sup> which is also likely to be heard next year. This case, while not inviting a frontal attack on *Roe*, does involve the same sort of provisions that were struck down by the Supreme Court in *Thornburgh*<sup>84</sup> and *City of Akron*,<sup>85</sup> so the continued vitality of those two cases is likely to be on the line. The Pennsylvania statute, among other provisions, contained a husband notification provision;<sup>86</sup> an informed consent requirement, which mandates that women seeking abortions listen to a state prescribed lecture on

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75. S.C. CODE ANN. § 44-41-31 (Law. Co-op. 1990); MICH. COMP. LAWS ANN. § 25.248(103) (West 1990).

76. MISS. CODE ANN. § 41-41-53 (Law. Co-op. 1990).

77. KY. REV. STAT. ANN. § 311.732 (Michie/Bobbs-Merrill 1990).

78. ILL. REV. STAT. ch. 38, para. 81-51 to -54 (Smith-Hurd 1988).

79. 410 U.S. 113 (1973).

80. No. 90-00013 (D.C. Guam June 26, 1990) (LEXIS, Genfed library).

81. *Id.*

82. *Guam to Appeal Striking Down of Abortion Curbs*, N.Y. Times, Sept. 22, 1990, at 8, col. 3.

83. 744 F. Supp. 1323 (E.D. Pa. 1990).

84. *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986).

85. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983).

86. *Casey*, 744 F. Supp. at 1384; 18 PA. CONN. STAT. ANN. § 3209 (1988), amended by 1989 Pa. Laws 64.

the risks and benefits of childbirth and abortion, followed by a twenty-four hour waiting period;<sup>87</sup> a parental consent requirement whereby the parent must listen to the same lecture;<sup>88</sup> and a requirement that doctors provide state mandated materials, including color pictures of fetal development, to their abortion patients.<sup>89</sup> The district court invalidated these provisions, but noted that *Roe v. Wade*'s future looked dim.<sup>90</sup> The court stated:

Individuals can no longer feel as secure with the protections provided by the judiciary in this area. Instead, a woman's privacy rights and individual autonomy may soon be subjected to the vicissitudes of the legislative process. . . . If unprotected by their vote and the votes of other pro-choice advocates, many women will be forced to seek abortion services elsewhere. For those that can afford it, this may only mean travelling to another jurisdiction. For those that cannot, the result may well be disastrous and tragic.<sup>91</sup>

While *Roe v. Wade* remains literally on the books, there is no longer a majority who support it, nor is there a majority who agree on an alternative formulation of the appropriate constitutional standard. Two members of the Court, Justices Blackmun and Marshall, adhere to the view that strict scrutiny is the appropriate test.<sup>92</sup> At the other end of the spectrum is

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87. *Casey*, 744 F. Supp. at 1380-81; 18 PA. CONN. STAT. ANN. § 3205(a)(1)(2) (1988), amended by 1989 Pa. Laws 64.

88. *Casey*, 744 F. Supp. at 1382; 18 PA. CONN. STAT. ANN. § 3206 (1988), amended by 1989 Pa. Laws 64.

89. *Casey*, 744 F. Supp. at 1381; 18 PA. CONN. STAT. ANN. § 3205(a)(2) (1988), amended by 1989 Pa. Laws 64.

90. *Planned Parenthood of Southern Pennsylvania v. Casey*, 744 F. Supp. 1323, 1396-97 (1990).

91. *Id.* at 1397.

92. Justice Blackmun has voiced his strong commitment to protecting a woman's right to reproductive freedom in a long line of cases. *See, e.g.*, *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Planned Parenthood Ass'n of Kan. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

Justice Marshall has articulated his belief that the strict scrutiny standard should be applied to cases dealing with the issue of reproductive freedom. *See, e.g.*, *Ohio v.*

Justice Scalia, who has repeatedly counseled the Court to get out of the business of reviewing abortion statutes altogether.<sup>93</sup> Three members of the Court, Justices Kennedy, White, and Chief Justice Rehnquist, would apply a reasonable basis test to measure state restrictions on abortion.<sup>94</sup> Justice Stevens would also use a mere rationality test, at least in cases involving minors,<sup>95</sup> but presumably, he would use some measure of heightened scrutiny when evaluating cases involving adults.<sup>96</sup> Finally, there is Justice O'Connor, who, at least before Justice Brennan's retirement, was viewed as the pivotal vote.<sup>97</sup> Justice O'Connor continues to maintain that state restrictions on abortion are to be measured by her undue burden test.<sup>98</sup> How she would apply this test to a direct ban on abortions is very much

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Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990).

93. See *Hodgson v. Minnesota* 110 S. Ct. 2926, 2960 (1990) (Scalia, J., concurring in the judgment in part and dissenting in part); *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2984 (1990) (Scalia, J., concurring); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring in part and concurring in the judgment).

94. For other Kennedy abortion opinions, see *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

For additional Rehnquist and/or White abortion decisions, see *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747 (1986); *Planned Parenthood Ass'n of Kan. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52 (1976); *Roe v. Wade*, 410 U.S. 113 (1973).

95. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2993 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2937 (1990).

96. *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 427 & 430 (1983).

97. See *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972 (1990); *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2949 (1990); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989); *Thornburgh v. American College of Obstetricians*, 476 U.S. 747, 814 (1986); *Planned Parenthood Ass'n of Kan. v. Ashcroft*, 462 U.S. 476 (1983); *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983); see also Note, *Sandra Day O'Connor, Abortion, and Compromise for the Court*, 5 *TOURO L. REV.* 327, 331 (1989).

98. Note, *Sandra Day O'Connor, Abortion, and Compromise for the Court*, 5 *TOURO L. REV.* 327, 334 (1989).

an open question since she has, on at least one occasion, referred to the state's interest in protecting potential life as compelling.<sup>99</sup> To date, Justice O'Connor has not found any state restriction to impose an undue burden.<sup>100</sup> In *Hodgson*, where she provided the fifth vote to strike down the two parent notification requirement with no bypass, she did so, not because it imposed an undue burden, but because it did not rationally further the state's interests.<sup>101</sup>

The wildest card of all, of course, is the Justice who will replace Justice Brennan.<sup>102</sup> The Senate Judiciary Committee is scheduled to vote on the nomination of Judge David Souter today,<sup>103</sup> with most political pundits predicting an easy confirmation. Those who followed the confirmation hearings know that Judge Souter steadfastly refused to respond to questions designed to probe his views on the abortion right.<sup>104</sup> While stating that he recognized a constitutional right of privacy, thus disassociating himself with the view expressed by Judge Bork at his confirmation hearings, he also said that he did not know how he would rule on a direct *Roe v. Wade* challenge.<sup>105</sup>

If confirmed, the first opportunity that he will have to express his views on this topic will arise in connection with two consolidated cases that also raise significant first amendment issues. The abortion cases on the Supreme Court's docket this Term, *Rust v. Sullivan* and *New York v. Sullivan*,<sup>106</sup> involve challenges to the 1988 Health and Human Services regulations, sometimes called its gag rules, which prohibit family planning clinics that receive federal funds from counseling cli-

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99. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3064 (1989).

100. *Id.* at 3063.

101. *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2950 (1990).

102. As of the date of this symposium, Justice Souter had not yet been confirmed to fill Justice Brennan's seat on the Court. See N.Y. Times, Sept. 27, 1990, at A1, col. 1.

103. *Id.*

104. *Senate Committee Endorses Souter*, N.Y. Times, Sept. 28, 1990, at A1, col. 1.

105. *What Verdict for Judge Souter*, N.Y. Times, Sept. 27, 1990, at A1, col. 1.

106. 110 S. Ct. 3234 (1990); see also *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988).

ents about abortions or referring clients for abortions.<sup>107</sup> The regulations also require the clinics to separate their Title X programs, both physically and financially, from any program that provides abortions, abortion counselling, or abortion referrals.<sup>108</sup> The Second Circuit rejected the free speech challenges and upheld the regulations.<sup>109</sup>

In contrast, the First and Tenth Circuits have ruled that the gag rules are unconstitutional because the regulations essentially require Title X programs to provide incomplete and misleading information, which constitutes a state imposed obstacle to a woman's exercise of her freedom of choice.<sup>110</sup> These courts have also found that the regulations violate a doctor's right to free speech, by conditioning participation in the Title X program on a waiver of constitutional rights.<sup>111</sup>

The Supreme Court will resolve what is now a conflict in the circuits and Judge Souter's vote in this case, assuming that he is confirmed, and that he takes his seat by November when arguments are scheduled, is likely to illuminate his views on abortion, privacy and free speech.

Another case calendared for this Term arises in a very different context, but could be said to at least tangentially implicate so-called "fetal rights." *Auto Workers v. Johnson Controls, Inc.*<sup>112</sup> is an employment discrimination case which challenges an employer's fetal protection policy which excludes women of childbearing age from high lead exposure jobs.<sup>113</sup>

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107. *Bowen*, 690 F. Supp. at 1264.

108. *Id.* at 1264-65 (including separate facilities, personnel, accounting, signs and any other indications of identification).

109. *Id.* at 1274.

110. *See Massachusetts v. Secretary of Health & Hum. Serv.*, 899 F.2d 53, 65 (1st Cir. 1990); *Planned Parenthood v. Sullivan*, 913 F.2d 1492, 1502 (10th Cir. 1990).

111. *See Massachusetts*, 899 F.2d at 72; *Sullivan*, 913 F.2d at 1504.

112. 886 F.2d 871 (7th Cir. 1989), *rev'd*, 59 U.S.L.W. 4209 (U.S. Mar. 20, 1991) The United State Supreme Court has determined that an employer's fetal protection policy that excludes females of childbearing capacity from jobs involving exposure to lead constitutes facially discriminatory policy of sex discrimination violative of Title VII of the Civil Rights Act of 1964. *Auto Workers*, 59 U.S.L.W. at 4212.

113. *Id.* at 876.



While this Term is not likely to result in any major pronouncement that overrules *Roe v. Wade*, what we are likely to see is a continuation of a process that began in *Webster*, of undermining and eroding *Roe*. A result of that process may well be a shift to state courts and arguments based on state constitutions. This process has already begun in Florida, where the state supreme court struck down a parental consent law on state constitutional grounds.<sup>114</sup> Similarly, a California court invalidated a parental notification statute finding that the California constitution protected the right to choose abortion as a fundamental privacy right.<sup>115</sup> In addition, six states have already found that their state constitutions require the state to provide Medicaid funding for abortions.<sup>116</sup> Here in New York, a case was filed last week that seeks to establish that abortion rights are protected by the New York State Constitution.<sup>117</sup>

These new efforts to turn to state constitutions to protect privacy interests reflect the foreboding expressed by Justice Blackmun in his dissent in *Webster*, where he stated, "[f]or today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control

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114. *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).

115. *American Academy of Pediatrics v. Van de Kamp*, 263 Cal. Rptr. 46 (Cal. Ct. App. 1989).

116. *Suit Seeks New Abortion Protection*, N.Y. Times, Sept. 25, 1990, at B4.

117. *Hope v. Perales*, filed Sept. 21, 1990 in Manhattan Supreme Court by the American Civil Liberties Union, Reproductive Freedom Project. This case was just recently decided. *Hope v. Perales*, 205 N.Y.L.J. 21 (April 17, 1991). *Hope* challenged the constitutionality of the Prenatal Care Assistance Program (PCAP), a medical assistance program for pregnant women with incomes at or below 100 and 185 percent of the federal poverty line, offering services designed to promote a healthy pregnancy, delivery, and recovery. *Id.* The New York Court of Appeals has read our state constitution expansively, broadening the scope of individual rights in our state constitution. *Id.* at 22. At present, PCAP violates the due process rights of a pregnant eligible woman for whom an abortion is medically necessary by leaving her with no real choice. *Id.* Even though the poverty of eligible women is not of the State's creation and there is no constitutional obligation to pay for the medical care of the poor (citing *Maher v. Roe*, 432 U.S. 464, 474 (1977)), the New York State equal protection clause guarantees equal protection in state benefits when such benefits are extended. To remedy the constitutional defect inherent in Chapter 584, PCAP must be expanded to include funds for medically necessary abortions. *Id.*

their destinies. But the signs are evident and very ominous, and a chill wind blows."<sup>118</sup>

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118. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3079 (1989) (Blackmun, J., dissenting).

